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In The

Supreme Court of the United States

October Term, 1994

PINEVILLE REAL ESTATE OPERATION CORPORATION, A NORTH CAROLINA CORPORATION, AND CARMEN VIANA, TRUSTEE OF THE RETIREMENT PLAN OF U.S.W. LOCAL 6141 EMPLOYEES OF EC MANUFACTURING DIVISION OF WITTEK INDUSTRIES, INC.,

Petitioners,

vs.

MARK A. MICHAEL, GLENN BREITWIESER, ERIC MEIERHOEFER, RONALD J. BIGGERS, JAMES E. BRANDON, LINDA M. CORNWELL, JAMES A. DUNN, KENNETH ELLIOTT, BETTY L. GRIFFIN, ROBERT L. JACKSON, TERRY K. JEWELL, KENNETH JORDAN, CHARLES E. LACKEY, RAYMOND E. LAMBERTH, JOHN EDWARD MILLER, JR., ROBERT A. MUNSE, DEBORAH W. STANTON, JOHN H. STARNES, GARY SWEENEY, JOANNE M. VEILLETTE, JERRY E. WINGATE and C.W. KIDD, JR., the SHERIFF OF MECKLENBURG COUNTY AND EXECUTION SALE PURCHASERS (DOES 1 to 10),

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

George C. Hook
George C. Hook, P.C.
Suite 1802-1
555 West Madison
Chicago, Illinois 60661
312-902-2547

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The primary question presented is whether a federal judgment that is the sole basis for taking property confers federal jurisdiction with respect to an action brought in the federal court to prevent such taking.

The Court of Appeals determined instead that the question was whether federal jurisdiction was conferred by federal rules and answered that it was not.

The subordinate questions are whether federal jurisdiction exists where the interpretation of federal rules is a substantial element of the cause of action and whether there are other bases for federal jurisdiction here, such as, for example, the assertion of broad and inherent power over federal process, including judgments, to prevent their being used to abuse, oppress and do injustice, and the assertion of equitable jurisdiction ancillary to the federal action in which the federal judgment was rendered.

PARTIES

All parties to the proceeding are listed in the caption of the case.

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REPORTS OF OPINIONS DELIVERED IN THE CASE

The opinion of the United States Court of Appeals for the Fourth Circuit in this case, *Pineville Real Estate Operation Corporation, et al. v. Mark A. Michael, et al.*, No. 93-1625, is officially reported at 32 F.3d 88.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Federal jurisdiction was invoked in federal court pursuant to 28 U.S.C. Section 1331. In this petition for writ of certiorari, jurisdiction is invoked pursuant to Supreme Court Rules 10.1.(a) and (c).

The dates of the entry of the decisions sought to be reviewed were August 8, 1994 for the decision by which the complaint was dismissed and September 2, 1994 for the decision denying reconsideration.

STATEMENT OF THE CASE

On July 7, 1992, Plaintiff Pineville purchased real estate from Wittek Industries, Inc. and mortgaged it to Plaintiff Pension Plan. However, the warranty deed and mortgage were not registered with the recorder of deeds of Mecklenburg County, North Carolina, until September 25, 1992. On October 9, 1992, the Defendants-Appellees docketed with the appropriate court of North Carolina final judgments obtained against Wittek Industries, Inc. in *Biggers et al. v. Wittek Industries, Inc.* and *Breitwieser v.*

Wittek Industries, Inc., consolidated for trial before the U.S. District Court for the Western District of North Carolina, Charlotte Division. However, as interlocutory orders had been entered in the consolidated cases on May 19, 1992 (relating to the jury's verdict in favor of Breitwieser),[1] and August 6, 1992 (relating to the Judge's verdict in favor of Biggers, et al.)[2] Defendants-Appellees docketed those orders, treating them as if they were final judgments under federal law even though they were not, as the District Court had made no "express determination that there is no just reason for delay" and "no express direction for the entry of judgment," as required by Federal Rule of Civil Procedure 54(b). Indeed, however, the first date upon which all of the "claims or the rights and liabilities . . . of all the parties" were determined as contemplated by Federal Rule of Civil Procedure 54(b) was September 21, 1992. Therefore, no proceeding could be commenced for enforcement of the judgments arising out of the consolidated cases before October 1, 1992. Federal Rule of Civil Procedure 62(a). Nevertheless, on May 24, 1993 Defendants-Appellants sought enforcement of their federal judgments by state enforcement action against the property which had been conveyed by Wittek

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[1] The Fourth Circuit Court of Appeals reversed this judgment in its opinion of August 27, 1993, 4 F.3d 291, and denied Defendant-Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc without opinion.

[2] The Fourth Circuit Court of Appeals affirmed this judgment in its opinion of August 27, 1993, 4 F.3d 291, and denied Defendant-Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc without opinion.

Industries, Inc. to Plaintiff-Appellant Pineville and mortgaged by it to Plaintiff-Appellant Pension Plan on July 7, 1992 and recorded on September 25, 1992, based upon their docketings of May and August 1992 as well as October, 1992.

Plaintiffs-Appellants sought to prevent the sale of their property to satisfy the federal judgments then outstanding against Wittek Industries, Inc. by obtaining a temporary restraining order and preliminary injunction in the very Federal district court that had entered such orders against Wittek, putting up the necessary bond therefor. That district court declined to grant such relief, Plaintiffs-Appellants appealed to the Fourth Circuit Court of Appeals and enforcement was stayed pending appeal upon the application of the bond to that purpose.

On August 8, 1994, the Fourth Circuit Court of Appeals dismissed the Plaintiffs-Appellants' complaint on the basis that there existed no federal jurisdiction and on September 2, 1994 denied Plaintiffs-Appellants' petition for rehearing and rehearing in banc without opinion.

REASONS FOR ALLOWANCE OF THE WRIT

Introductory

The Fourth Circuit Court of Appeals has decided an important question which has not been, but should be, settled by the Supreme Court.

There are no cases specifically holding that a federal judgment, which is the sole basis for claiming entitlement to Plaintiffs' property, will support federal jurisdiction;

although there are numerous cases which hold that there is such jurisdiction where federal law creates the cause of action and there are numerous cases which hold that such jurisdiction exists even in the absence of such creation if the action poses a substantial federal question.

In declining jurisdiction in this case, the Fourth Circuit Court of Appeals decision conflicts with these numerous other cases, including Supreme Court decisions, *The Fair v. Kohler Dye & Speciality Co.*, 228 U.S. 22 (1913), *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), *Hopkins v. Walker*, 244 U.S. 486 (1917), *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), *Oneida Indian Nation v. Oneida County*, 414 U.S. 661 (1974), *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *Spallone v. United States*, 493 U.S. 265 (1990) and *Willy v. Coastal Corp.*, 112 S.Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992), and other Circuit Court of Appeals decisions, *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60 (2d Cir. 1990), *W. 14th St. Comm. Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188 (2d Cir. 1987), *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798 (2d Cir. 1960), *Milan Express Co. v. Western Surety Co.*, 886 F.2d 783 (6th Cir. 1989), *Smith v. U.S. District Court for the Southern District of Illinois*, 956 F.2d 647 (7th Cir. 1992) and *Valerio v. Boise Cascade Corp.*, 645 F.2d 699 (9th Cir. 1990).

However the questions presented are answered, the Federal Judicial System would benefit greatly from their resolution by the Supreme Court. No case has been found which does that for what must be a recurring situation.

Whether federal judgments and their proper enforcement provide bases for federal jurisdiction is a question of exceptional importance. The answer should be uniform throughout the entire Federal Judicial System.

The Fourth Circuit Court of Appeals decision asserted that "when there is no federal cause of action and the application of a federal statute is but an element of Plaintiff's state cause of action, we lack federal question jurisdiction," citing *Clark v. Velsicol Chemical Corp.*, 944 F.2d 196 (4th Cir. 1991) and *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). However, that is not the law. If state law creates a cause of action, federal question jurisdiction exists, nevertheless, if that cause of action possesses a substantial federal question. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921), *W. 14th St. Comm. Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188 (2d Cir. 1987).

The Court of Appeals decision asserts that Federal Rules of Civil Procedure "cannot be the basis for federal question jurisdiction," citing *Port Drum Co. v. Umphrey*, 852 F.2d 148 (5th Cir. 1988), *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60 (2d Cir. 1990) and Federal Rule of Civil Procedure 82. However, that statement is an impure derivative from cases inapposite to this one. It is not the federal rules alone that create the federal jurisdiction in this case, but rather a federal judgment which is the sole basis for the attempted taking of property, which taking Plaintiffs-Appellants sought to prevent by seeking an injunction in the same federal district court which rendered that judgment. The particular rules in those cases related to procedural aspects of previous cases, Rule 11 in *Port Drum* and the discovery rules in *Cresswell*. Here, the

relevant rules determined whether the Defendants-Appellees had a federal right to use the judgment which they obtained against Wittek Industries, Inc. against property which belongs to Plaintiffs-Appellants, Pineville Real Estate Operation Corporation and the Retirement Plan of the United Steelworkers Local 6141. These cases, which are clearly specific to the specific rules with which they deal were misapplied by the Fourth Circuit Court of Appeals. Federal jurisdiction was exercised in *Cresswell*, in fact, on a basis, ancillary jurisdiction, that has application here.

Port Drum, upon which the Fourth Circuit of Appeals relied so heavily in this case, appears to conflict with the decision of the Supreme Court in *Willy v. Coastal Corp.*, 112 S.Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992), where the lower court was held to have jurisdiction to impose Federal Rule 11 sanctions even though it did not otherwise have jurisdiction.

The Fourth Circuit Court of Appeals ignored the fact that federal rights conferred solely by a federal judgment were being asserted as the basis for depriving Plaintiffs of their property and that the core question in the federal court proceeding to stop this was whether Defendants had those federal rights. The Fourth Circuit Court of Appeals took away some of those rights by its subsequent reversal of some of the judgments upon which Defendants relied, demonstrating Plaintiffs-Appellants' argument in a very clear and practical way that a federal question existed which provided the basis for federal jurisdiction. If it were otherwise, the Defendants-Appellees could now proceed against the property of Pineville and the Pension Plan for the entire amount of the original

judgments Defendants obtained against Wittek Industries, Inc. in their prior action merely because they proceeded to enforce those federal rights by state process without regard to whether they actually had them under federal law. Such a conclusion would render useless and irrelevant the federal appellate process and permit a circumvention of the entire Federal Judicial System through the simple expedient of state enforcement mechanisms.

Detailed Analysis

A substantial federal question exists in this case sufficient to support federal jurisdiction. The broad pronouncements extracted from the cases cited by the Fourth Circuit Court of Appeals do not have application here. Rather, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921), *Milan Express Co. v. Western Surety Co.*, 886 F.2d 783 (6th Cir. 1989), *W. 14th St. Comm. Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188 (2d Cir. 1987), and *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798 (2d Cir. 1960) are determinative in supporting federal jurisdiction.

Of the cases cited by the Fourth Circuit Court of Appeals, the following may be said. *Clark v. Velsicol Chemical Corp., supra,* was a negligence action brought by United Parcel Service employees who were injured by insecticides leaking from a shipping package. They conceded that the federal insecticide regulations were relevant only as an element of evidence to establish negligence under State law. Those regulations did not create the right as the federal judgments do in this case.

Likewise, in *Merrell Dow Pharmaceutical, Inc. v. Thompson*, supra, a federal statute was merely incorporated by reference as a standard of conduct in a state negligence action. The Supreme Court held that the Federal Judicial System would not be served by a federal adjudication of that issue. By contrast, and indisputably, the Federal Judicial System will be served by an adjudication of the issue in this case.

Bernard v. U.S. Lines, Inc., 475 F.2d 1134 (4th Cir. 1973) and *Kenrose Mfg. Co. v. Fred Whitaker, Inc.*, 512 F.2d 890 (4th Cir. 1972), are merely examples of the proposition, clearly inapplicable to this case, that a third party action, permitted by Rule 14, must have an independent federal jurisdictional base.

Port Drum, supra, was brought pursuant to Rule 11 by the employer of plaintiff in a prior action against the employee's attorney for falsely pleading therein and thereby damaging Port Drum because the defendant in the prior action and others ceased to be its customers in consequence of the prior suit. *Port Drum* acknowledged that a federal rule of civil procedure has the force of a federal statute, citing *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), but then held that Rule 11 "specifically" is not a "law" in the Section 1331 sense because it merely regulates a party's proceedings once that party is in federal court pursuant to another jurisdictional ground. In reaching this conclusion, the Court also noted that by its terms Rule 11 states that it can be asserted only during the pendency of the action in which the offending pleadings are a part and not by separate complaint in another proceeding. Apart from this peculiarity of Rule 11, which should have been the sole basis for the decision, *Port*

Drum is wrongly decided on the jurisdictional ground for the reasons set forth hereinafter in the discussion of ancillary jurisdiction and because it conflicts with *Willy v. Coastal Corp.*, 112 S.Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992).

Cresswell v. Sullivan & Cromwell, supra, held that violation of the discovery rules in a prior action would not support federal jurisdiction of an action for which there was no other basis. However, the Second Circuit Court of Appeals found that other basis in the inherent powers of the Court to provide relief from a judgment rendered by it in previous litigation; that it had what is well recognized as ancillary equitable jurisdiction. To like effect is *Martina Theatre Corp. v. Schine Chain Theatres*, supra, where the Court stated that such an action may be brought in the federal court that rendered the initial judgment despite the absence of a federal question; and that such jurisdiction is sufficiently flexible so that action may even be maintained with respect to a person who was not a party to the original action, as was the case also in *Cresswell* and *Valerio v. Boise Cascade Corp.*, 645 F.2d 699 (9th Cir. 1990).

As stated in *W. 14th St. Comm. Corp. v. 5 W. 14th Owners Corp.*, supra:

> There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exists. In *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 36 S.Ct. 585, 60 L.Ed. 987 (1916), Justice Holmes devised this still relied upon rule writing that "[a] suit arises under the law that

> creates the cause of action." *Id.* at 260, 36 S.Ct. at 586; see also *The Fair v. Kohler Dye & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal question. The lineage of this second test of "arising under" jurisdiction reaches back 65 years to *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201, 41 S.Ct. 243, 65 L.Ed. 577 (1921). In that case, plaintiff sought to enjoin defendant corporate officers from investing corporate funds in farm loan bonds issued by federal land banks because the act authorizing their issue was unconstitutional – and hence constituted an investment in an unlawful security under Missouri law. The Supreme Court found federal jurisdiction present because of the necessity to decide the constitutional issue as an element of the state law claim.

The Defendants-Appellees took the judgments that they obtained in *Biggers v. Wittek* (C-C-91-96-P) and *Breitwieser v. Wittek* (C-C-91-98-P), both tried in the U.S. District Court of the Western District of North Carolina, Charlotte Division before Judge Potter, and attempted to satisfy them from property which had belonged to Wittek at one time, but not at the time such judgments could be executed.

Use of the state execution mechanism for federal judgments has its basis in the full faith and credit clause of the Constitution and more particularly 28 U.S.C. Section 1962, which provides:

> Every judgment rendered by a district court within a State shall be a lien on the property

> located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time . . . Whenever the law of any State requires a judgment of the State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to the judgments of the courts of the State.

Furthermore, Article I, Section 8 of the Constitution authorizes the Congress to set up the lower federal courts and to establish rules and regulations for the conduct of litigation in those courts. *Willy v. Coastal Corp.*, 112 S.Ct. 1076 (1992). The Supreme Court, pursuant to authority delegated by Congress, as head of the Federal Judicial System, has an extensive power to prescribe rules of practice and procedure for civil actions. The Chief Justice of the United States is the head of the Judicial Conference of the United States, which is charged with, among other matters, studying the operation and effect of the various procedural rules prescribed by the Supreme Court for the other courts of the United States, and recommending changes in and additions to those rules. 28 U.S.C. suits arise under federal law for federal question jurisdiction if founded upon federal common law as well as statutory law. *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447 (1985), *Smith v. U.S.*

District Court for the Southern District of Illinois, 956 F.2d 647 (7th Cir. 1992), MOORE'S FEDERAL PRACTICE (2d ed.) Para. 1.02a[2]. Moreover, all federal courts have a broad and inherent power over their own process, including judgments, to prevent abuses, oppression and injustice and to do substantial justice. *Willy v. Coastal Corp.*, supra, *Spallone v. United States*, 493 U.S. 265 (1990).

The instant case is like *Milan Express Co. v. Western Surety Co.*, supra, which determined that there was federal jurisdiction, and should be applied here rather than *Port Drum*, supra, which had its peculiar origins in Rule 11 and which conflicts with the Supreme Court decision in *Willy v. Coastal Corp.*, 112 S.Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992). *Milan* was brought by motor carriers against surety companies on bonds prescribed pursuant to federal statutes and regulations. The surety companies argued that because the disputed bonds must be interpreted and enforced in accordance with state law, the district court properly concluded that there was no federal question. The Sixth Circuit Court of Appeals reversed. In support of its correct decision, that Court said:

> To determine which civil actions fall within, and which civil actions fall outside, the subject matter jurisdiction of the district courts, this court has adopted a familiar definition of the statutory phrase "arising under." [In] *Ford Motor Co. v. Transport Indemnity Co.*, 795 F.2d 538 (6th Cir. 1986), we explained that:
>
> "Arising under" for purposes of Section 1337(a) [the Section in issue in *Milan*] is interpreted similarly to the analogous "arising

under" language in Section 1331, 28 U.S.C. Section 1331 [the Section in issue in the present case].

* * *

On appeal, plaintiff motor carriers contend that a substantial body of federal law – the forms, rules regulations and decisions of the ICC, in addition to the Act – establishes that they are entitled to collect past-due freight charges from the defendant surety companies who posted bonds on behalf of the delinquent brokers.

* * *

Plaintiffs continue that because their right to collect on the bonds was created by federal law and is essential to their case, their cause of action arises under an act of Congress regulating commerce and thus, should be heard in a federal forum.

* * *

However, because the bonds are created on federal forms, administered under federal regulations, and required by a federal statute, we find little merit in defendant's arguments.

* * *

[P]laintiffs'] claims for recovery under the bonds, which are clearly creatures of federal law, should not be subjected to the peculiarities of interpretation in fifty different state forums. Rather, plaintiffs' claims should be heard in a federal forum that possesses substantial expertise in matters of interstate commerce.

* * *

> *Merrell Dow* can be distinguished from the present case [*Milan*] on several grounds. First, this court declined to find federal jurisdiction in *Merrell Dow* because plaintiffs failed to prove that their relief **depended necessarily** on a substantial question of federal law. Thus, the jury could have easily found the defendant to be negligent, but not in violation of the FDCA. See *Thompson v. Merrell Dow*, 766 F.2d 1005, 1006 (6th Cir. 1985), **aff'd** 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). By contrast, the present plaintiffs have relied exclusively on federal law in their suit to recover on bonds required, promulgated, and regulated by the ICC. Second, the *Merrell Dow* plaintiffs did "not allege that federal law create[d] any of the causes of action they . . . asserted." *Merrell Dow*, 478 U.S. at 809, 106 S.Ct. at 3233. The *Merrell Dow* plaintiffs merely asserted that the defendant's violation of the FDCA constituted proof of negligence. See **id.** at 809-11, 106 S.Ct. at 3232-34. The present plaintiffs, however, argue that their rights to the proceeds of the surety bonds were created by federal law and should be enforced in a federal forum. Third, in *Merrell Dow*, no specific and compelling federal interest was demonstrated. In contrast, our finding of subject matter jurisdiction in the present case is entirely consistent with the specific federal interest in the production of motor carriers and the historical federal interest in the regulation of interstate commerce.

The *Milan* analysis of surety bonds has even greater applicability to the far more integral and important federal judgments of Federal District Courts.

W. 14th St. Comm. Corp. v. 5 W. 14th Owners Corp., supra, held that there was federal jurisdiction arising under a federal statute which authorized a federal action for terminating self-dealing contracts resulting in abuses under state condominium and cooperative laws. However, the Second Circuit Court of Appeals also held that even in the absence of that basis for federal jurisdiction there was federal jurisdiction because plaintiffs' state claims encompassed a substantial federal question. Particularly germane to the present case is that Court's analysis of the necessarily federal aspect of any action of enforcement of such contracts which the defendants could bring as support for plaintiffs bringing their action in federal court. Here, of course, there was no anticipation; Defendants were minutes away from taking Pineville's property based on their federal judgments, including those that were later reversed on appeal, when they were prevented by Pineville's and the Pension Plan's intervention in the Federal District Court.

The Second Circuit Court of Appeals analyzed the issue as follows:

> [I]f . . . defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.
>
> * * *
>
> Owners Corp. responds that it need not have brought a federal suit, but could have sued in state court in trespass, ejectment or contract.
>
> * * *
>
> . . . [I]t is true that it could have brought a state action . . . But, a well-pleaded complaint under

either of these theories would have to set forth Owners Corp.'s current right to possession . . . And, because Owners Corp.'s "current right to possession [is allegedly] conferred by federal law" under the authority of Section 3607, a well-pleaded complaint alleging these state law possessory actions would necessarily raise a federal question. *Oneida Indian Nation*, 414 U.S. at 666, 94 S.Ct. at 776.

* * *

The second approach leads to the same conclusion. In addition to examining defendant's "threatened" action, we examine plaintiffs' complaint to see if it raises a federal question when viewed as a coercive action apart from defendant's anticipated suit

* * *

Viewing the complaint as an equitable action seeking coercive relief, it may properly be considered as a common law or statutory action to remove a cloud on title. Under *Hopkins v. Walker*, 244 U.S. 486, 37 S.Ct. 711, 61 L.Ed. 1270 (1917), "the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action." 244 U.S. at 490, 37 S.Ct. at 713. Consequently, since it is the provisions of Section 3607 that give rise to the cloud, the statute must necessarily be pleaded in a well-pleaded action to remove that cloud . . . Thus considered as a common law action, the complaint necessarily raises a substantial federal question on the face of a well-pleaded complaint.

* * *

> Plaintiffs' well-pleaded complaint under the quieting title statute would have to allege defendant's adverse claim under Section 3607 and would therefore raise a federal question.

The Fourth Circuit Court of Appeals made no reference to the complaint filed in this case, whether it examined it or not, but such an examination clearly demonstrates the point being made by the Second Circuit Court of Appeals above. Throughout said complaint the federal judgment is alleged, correctly, as the sole basis for the attempted unlawful taking of the Plaintiffs' property. All of Count I of that complaint, alleging various abuses of process, is dependent upon the validity of the federal judgments. Likewise, all of Count II, alleging various interferences with prospective economic advantage, is dependent upon the validity of the federal judgments. Validity or invalidity of such federal judgments is decisive to their enforcement. If the federal judgments were final and enforceable prior to the time that the property against which they were sought to be enforced was conveyed to Pineville and mortgaged to the Pension Plan then the Plaintiffs' causes of action will fail. If, on the otherhand, such actions were not final and enforceable at the time the property was conveyed, the Defendants have no entitlement to the property of Plaintiffs and their efforts to take it from Plaintiffs is actionable. It is not germane to the core issue that Defendants sought to effect such taking by North Carolina's enforcement procedures instead of Federal enforcement procedures. Plaintiffs have a right to stop them and the sole basis for so doing depends on the question of the validity of the federal judgments.

As the Second Circuit Court of Appeals stated at 815 F.2d 196, in distinguishing *Merrell Dow* [and hence also its progeny *Port Drum* from the Condominium case and hence this case]:

> Nonetheless, assuming that plaintiffs have no private right of action . . . , we conclude that the federal element in plaintiffs' state cause of action would still be sufficiently substantial to confer arising under jurisdiction. In *Merrell Dow* the federal statute was merely incorporated by reference as a standard of conduct in a state negligence action. Here the situation is quite different. In construing the Condominium Relief Act in a state cause of action, the federal issue is decisive because upon that Act's construction the vindication of rights and definition of relationships **created by federal law** depends. See *Gully*, 299 U.S. at 116, 57 S.Ct. at 99. In light of this qualitative difference, the federal ingredient in plaintiffs' complaint in this case is sufficiently substantial to confer the arising under jurisdiction.

Professor Moore has summarized the essence of federal question jurisdiction as follows:

> [T]he often repeated test of the federal character of the action . . . is whether "the title or right set up by the party, may be defeated by one construction of the Constitution or laws of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out" [citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738, 822 (1824)] MOORE'S FEDERAL PRACTICE (2d ed.) Para. 0.62 [2.-2] at p. 657.

This well-established legal principle continues to be applied in construing whether federal question jurisdiction exists. In *Westmoreland Hospital Ass'n v. Blue Cross of Western Pennsylvania,* 605 F.2d 119 (3d Cir. 1979), in a dispute between hospitals and an insurer over the proper accounting treatment of certain federal grants to the hospitals, a state court action by the hospitals was removed by the insurer on the basis of federal question jurisdiction. The district court entered judgment in favor of the insurer, based on the construction of the contract with the hospitals under state law. The Third Circuit Court of Appeals reversed, holding that an action arises under the laws of the United States if the action requires construction of a federal statute or the application of federal legal principles. In *Westmoreland,* the complaint alleged that the policy of the federal grants required the hospital's accounting treatment to prevail and, therefore, the Court of Appeals held, the complaint drew legal conclusions based on federal legal principles.

Likewise, the Fourth Circuit Court of Appeals has held in *City National Bank v. Edminsten,* 681 F.2d 942 (4th Cir. 1982) that federal jurisdiction exists with respect to a state created cause of action if its resolution depends on the validity, instruction or effect of federal law as a real and substantial issue.

Such is the federal issue in this case. It is integral and essential to the resolution of Defendants' attempted execution against Plaintiffs' property and the abuse of process and interference claims deriving therefrom.

WHEREFORE, the Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE C. HOOK,
Attorney for Petitioners

APPENDIX

Page

Court of Appeals' Opinion dismissing for want of federal jurisdiction .....App. 1

Order of District Court granting stay pending appeal .....App. 7

Order of District Court denying temporary restraint and denying order to show cause for preliminary injunction .....App. 9

Court of Appeals' Denial of petition for rehearing and suggestion for rehearing in banc .....App. 13

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PINEVILLE REAL ESTATE OPERATION CORPORATION, a North Carolina Corporation; CARMEN VIANA, Trustee of the retirement Plan of the U.S.W. Local 6141 Employees of EC Manufacturing division of Wittek Industries, Incorporated, *Plaintiffs-Appellants,* v. MARK A. MICHAEL; ERIC MEIERHOEFER; GLENN BREITWIESER; RONALD J. BIGGERS; JAMES E. BRANDON; LINDA M. CORNWELL; JAMES A. DUNN; KENNETH W. ELLIOTT; BETTY L. GRIFFIN; ROBERT L. JACKSON; TERRY K. JEWELL; KENNETH JORDAN; CHARLES E. LACKEY; RAYMOND W. LAMBERTH; JOHN EDWARD MILLER, JR.; ROBERT A. MUNSE; DEBORAH W. STANTON; JOHN H. STARNES; GARY SWEENEY; JOANNE M. VEILLETTE; JERRY E. WINGATE; C.W. KIDD, Sheriff of Mecklenburg County; EXECUTION SALE PURCHASERS, (Does 1 to 10), *Defendants-Appellees.*	No. 93-1625

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge.

(CA-93-162-C-C-P)

Argued: June 8, 1994

Decided: August 8, 1994

Before ERVIN, Chief Judge, and NIEMEYER and WILLIAMS, Circuit Judges.

Dismissed by published per curiam opinion.

COUNSEL

ARGUED: George Clive Hook, II, GEORGE C. HOOK, P.C., Chicago, Illinois, for Appellants. Eric Robert Meierhoefer, Charlotte, North Carolina, for Appellee.

OPINION

PER CURIAM:

Federal Rule of Civil Procedure 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."[1] Pineville Real

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[1] In the order denying a temporary restraining order and preliminary injunction from which Pineville appeals, the district court noted its skepticism regarding the basis for jurisdiction. Although Defendants filed a motion to dismiss for lack of subject matter jurisdiction, Pineville had already noticed its appeal to this court. Thus, the district court denied the motion because it was without jurisdiction to address it. The district court correctly noted that Defendants could present the motion before the Fourth Circuit because lack of subject matter jurisdiction

Estate Operation Corporation and Carmen Viana[2] assert no federal cause of action, and the only basis for federal jurisdiction offered by Pineville in this case is that it "aris[es] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988).

The Defendants in this case obtained a federal judgments against Wittek Industries in a prior ERISA action.[3] They recorded liens in the local land records, pursuant to N.C. Gen. Stat. § 1-237 (1983), against property owned by Wittek Industries. The underlying complaint in this case consists of two state law causes of action for abuse of process and interference with prospective advantage, through which Pineville seeks to enjoin state enforcement of the liens by the Defendants and the Sheriff of Mechlenburg County. Pineville argues that the federal judgments were not final when the liens were filed, and did not become final until after the property owned by Wittek Industries had been conveyed to Pineville Real Estate Corporation. As its basis for federal subject matter jurisdiction, Pineville contends that its complaint presents a federal question regarding the finality of the federal judgments under Federal Rule of Civil Procedure 54(b), and resolution of this question is

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may be raised at any time. We deferred ruling on Defendant's motion to dismiss before this court until oral argument.

[2] Viana, Trustee of the Retirement Plan of U.S.W. Local 6141 Employees of EC Manufacturing Division of Wittek Industries, Inc., is also a plaintiff in this action. Both parties will be referred to collectively as "Pineville."

[3] The judgments in question were entered in another case heard by this court on appeal, *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291 (4th Cir. 1993).

essential to determine the validity and priority of the liens filed pursuant to North Carolina law as a result of those judgments. Beyond the Federal Rules of Civil Procedure, Pineville offers no other federal statute or regulation to support a right of action or remedy in this case.

As we held in *Clark v. Velsicol Chemical Corp.*, 944 F.2d 196, 198 (4th Cir. 1991) (citing *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 817 (1986)), *cert. denied*, 112 S. Ct. 1173 (1992), when there is no federal cause of action and the application of a federal statute is but an element of Plaintiff's state cause of action, we lack federal question jurisdiction. That result is even more apparent when, as here, the only federal law Pineville argues is relevant to the case are the Federal Rules of Civil Procedure, because the Rules themselves provide that they are not to be construed to limit or extend the jurisdiction of the district courts. Fed. R. Civ. P. 82; *see also Bernard v. U.S. Lines, Inc.*, 475 F.2d 1134, 1136 (4th Cir. 1973) (jurisdiction is not to be extended by the Federal Rules of Civil Procedure); *Kenrose Mfg. Co. v. Fred Whitaker, Inc.*, 512 F.2d 890, 893 (4th Cir. 1972) ("By express provision the [Federal Rules of Civil Procedure] are not to be read as a source of jurisdiction."); *Waffenschmidt v. Mackay*, 763 F.2d 711, 720 (5th Cir. 1985) ("Federal Rules of Civil Procedure do not expand or restrict the jurisdiction that the court otherwise possesses."), *cert. denied*, 474 U.S. 1056 (1986); *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 886 (3d Cir. 1977) (Federal Rules of Civil Procedure cannot be used to expand the subject matter jurisdiction of the district courts); *Brennan v. Silvergate Dist. Lodge No. 50, Int'l Ass'n of Machinists*, 503

F.2d 800, 804 (9th Cir. 1974) (Federal Rules of Civil Procedure do not enlarge the jurisdiction of federal courts); *Pettyjohn v. Pettyjohn*, 192 F.2d 322, 326 (8th Cir. 1951) (Federal Rules of Civil Procedure are wholly procedural and neither extend no limit the established jurisdiction of federal district courts).

The point is well stated in the Fifth Circuit case, *Port Drum Co. v. Umphrey*, 852 F.2d 148, 149-50 (5th Cir. 1988), that the Rules are not "laws" in the sense intended in § 1331, and that they cannot be the basis for federal question jurisdiction:

> The rules, then, only implement the exercise of jurisdiction *otherwise* conferred by Congress and do not provide an independent basis for parties without any other jurisdictional grant to get into federal court in the first place. *See Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-46, 66 S. Ct. 242, 245-46, 90 L.Ed. 185 (1946).
>
> A contrary analysis would be circular and would defeat the concept of federal jurisdiction as *limited*.

852 F.2d at 149-50 (emphasis in original); *see also Cressell v. Sullivan & Cromwell*, 922 F.2d 60, 70 (2d Cir. 1990) ("The Rules do not provide an independent ground for subject matter jurisdiction over an action for which there is no other basis for jurisdiction."), *cert. denied*, 112 S. Ct. 3036 (1992).

Interpretation of the Federal Rules of Civil Procedure, even if such were required in this case, does not present a federal question for purposes of conferring federal subject matter jurisdiction under § 1331. Because

Pineville asserts no other basis for federal jurisdiction, the complaint is, accordingly, dismissed.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:93CV162-P

PINEVILLE REAL ESTATE OPERATION CORPORATION, a North Carolina Corporation, and CARMEN VIANA, Trustee of the Retirement Plan of U.S.W. Local 6141 Employees of EC Manufacturing Division of Wittek Industries, Inc.,

Plaintiffs,

v.

MARK A. MICHAEL, et al.,

Defendants.

ORDER

(Filed May 24, 1993)

THIS MATTER is before the Court on Plaintiffs' Motion, filed May 24, 1993, for Stay Pending Appeal.

On May 21, 1993, this Court denied Plaintiffs' motion for temporary restraining order of the sheriff's sale of property commonly known as 413 Polk Street, Pineville, North Carlina [sic]. The sale is scheduled for today at noon. Plaintiffs represent that the parties have agreed that the amount of the supersedeas bond ($380,356.87) that they have presented is sufficient cover [sic] the judgment and interest. Because the bond is sufficient to maintain the status quo while the appeal is pending, the Court will grant the stay.

NOW, THEREFORE, IT IS ORDERED that Plaintiffs' Motion for Stay be, and hereby is, GRANTED. The sheriff's sale scheduled for noon today of the property commonly known as 413 Polk Street, Pineville, North Carolina, shall not take place. Sheriff Kidd, his employees, agents, and any other persons directly involved in the sale are ordered to cease and desist with the forced sale of the property pending further order of this Court.

This is the 24th day of May, 1993.

/s/ Robert D. Potter
ROBERT D. POTTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:93CV162-P

PINEVILLE REAL ESTATE OPERATION CORPORATION, a North Carolina Corporation, and CARMEN VIANA, Trustee of the Retirement Plan of U.S.W. Local 6141 Employees of EC Manufacturing Division of Wittek Industries, Inc.,

Plaintiffs,

v.

MARK A. MICHAEL, et al.,

Defendants.

ORDER

(Filed May 25, 1993)

THIS MATTER is before the Court on Plaintiffs' Motion, filed May 18, 1993, for Temporary Restraining Order and Order to Show Cause for Preliminary Injunction.

Plaintiff Pineville Real Estate Operation Corporation ("Pineville") and Carmen Viana are attempting to enjoin a execution sale of real property pursuant to state law that is scheduled to take place on May 24, 1993 at noon. Defendants Glenn Breitwieser and Ronald J. Biggers, *inter alia*, (collectively, the "judgment creditors") obtained a judgment against Wittek Industries ("Wittek") in *Biggers, et al. v. Wittek Indus.*, C-C-91-96-P, C-C-91-98-P (W.D.N.C. 1992), and are thereby judgment creditors of Wittek who

are entitled to seek process against any of Wittek's property they can locate. The judgment creditors initially attempted to docket their judgment in the land records in May, 1992. Pineville bought a certain parcel of real estate (the "Property")[1] from Wittek on July 7, 1992, just after the trial of this matter concluded in May of 1992.

There is a threshold issue of subject matter jurisdiction. Plaintiffs' complaint bases jurisdiction on an alleged federal question. Plaintiffs allege that they have priority over the judicial lien. They further allege that the date that the judgment in the underlying case became final is a question of federal law that will support federal question jurisdiction. Although the Court is somewhat skeptical of this basis for jurisdiction after conducting its initial research, the Court will reserve judgment on this issue. The Court believes that the merits of the case do not merit the entry of a temporary restraining order.

The present matter concerns the issue of the priority of the judgment creditors' liens vis-a-vis the conveyance of the Property to Pineville on July 7, 1992. After a jury trial and verdict for the judgment creditors, the Court entered an initial judgment covering vacation pay and one other element of damages. The judgment reserved ruling on severance pay, exemplary damages, costs and fees. The Court entered a judgment on August 6, 1992 that awarded further damages against Wittek and awarded attorney's fees against Wittek as well. The judgment set deadlines for the judgment creditors' attorneys'

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[1] The Property's street address is 413 Polk Street, Mecklenburg County, North Carolina.

to document their fees. The last judgment – which rendered the actual dollar amount of attorney's fees – was docketed on August 21, 1992.[2] At the very latest then, after considering the automatic ten day stay for judgments rendered in federal court, *see* Fed. R. Civ. P. 62(a), the judgment creditors could have obtained a priority date of August 30, 1992. Plaintiffs did not file their deed until September 25, 1992.

The Court believes that Plaintiffs are unlikely to succeed on the merits and that a temporary restraining order should therefore not be granted. In addition, the Court finds that Plaintiffs have not demonstrated a probability of irreparable harm. If their arguments turn out to be meritorious, they will have a cause of action against some, if not all, Defendants and they may have a cause of action against the Sheriff. Most significantly, Plaintiffs' attorneys have not certified in writing to the Court the reasons why notice can or should not be given or the efforts that were made to give notice of the motion for a temporary restraining order. Fed. R. Civ. P. 65.

Because the execution sale of the Property will occur on Monday, May 24, 1993, any hearing on the Motion for Order to Show Cause for Preliminary Injunction would

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[2] The Court vacated the last judgment by judgment entered September 11, 1992. The September 11, 1992 judgment, however, was cancelled out by the Court's order docketed September 21, 1992 which vacated the September 11, 1992 judgment. The Court vacated the September 11, 1992 judgment when it discovered that Witteck had filed a prior notice of appeal thereby divesting this Court of jurisdiction. The end effect is that the final and last judgment was docketed on August 21, 1992.

be moot. Accordingly, the Court will deny that motion as well.

NOW, THEREFORE, IT IS ORDERED that the Motion for Temporary Restraining Order be, and hereby is, DENIED.

IT IS FURTHER ORDERED that the Motion for Order to Show Cause for a Preliminary Injunction be, and hereby is, DENIED as moot.

This the 21st day of May, 1993.

/s/ Robert D. Potter
ROBERT D. POTTER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 2, 1994

No. 93-1625
CA-93-162-C-C-P

PINEVILLE REAL ESTATE OPERATION CORPORATION, a North Carolina Corporation; CARMEN VIANA, Trustee of the Retirement Plan of U.S.W. Local 6141 Emplyees of EC Manufacturing Division of Wittek Industries, Incorporated

Plaintiffs - Appellants

v.

MARK A. MICHAEL; ERIC MEIERHOEFER; GLENN BREITWIESER; RONALD J. BIGGERS; JAMES E. BRANDON; LINDA M. CORNELL; JAMES A. DUNN; KENNETH W. ELLIOTT; BETTY L. GRIFFIN; ROBERT L. JACKSON; TERRY K. JEWELL; KENNETH JORDAN; CHARLES E. LACKET; RAYMOND W. LAMBERTH; JOHN EDWARD MILLER, JR.; ROBERT A. MUNSE; DEBORAH W. STANTON; JOHN H. STARNES; GARY SWEENEY; JOANNE M. VEILLETTE; JERRY E. WINGATE; C. W. KIDD, Sheriff of Mecklenburg County; EXECUTION SALE PURCHASERS, (Does 1 to 10)

Defendants - Appellees

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banch, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK